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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **O.M.P.(I) 25/2017**

Date of decision: 29th November, 2017

REGEN POWERTECH PRIVATE LIMITED Petitioner
Through Mr.Jayant Mehta, Mr.Anshul
Raajan and Mr.S.Aravindan,
Advs.

versus

GREEN INFRA WIND SOLUTIONS ASSETS LIMITED
& ANR. Respondents
Through Mr.Abhinav Vasisht, Sr. Adv.
with Mr.Shankh Sengupta,
Ms.Tine Abraham and
Ms.Perna Jain, Advs.

**CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA**

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner seeking an order restraining respondent No.1 from invoking or receiving money under the Performance Bank Guarantees bearing Nos.0993017BG0000153 dated 21.07.2017 and N81GPGE171850001 dated 04.07.2017.

2. Learned counsel for respondent No.1 had entered appearance on advance notice and has been heard in objection to the petition. As a very limited order of protection is intended to be granted in favour of the petitioner, I deem it appropriate not to seek formal reply from respondent No.1. Respondent No.2 is stated to be only a proforma party.

3. The respondent No.1, being desirous of setting up and developing 75 MW Wind Power Project in Karadikonda District in the State of Andhra Pradesh, had placed a purchase order on the petitioner for supply of 50 numbers of Wind Turbine Generators(WTGs) and for this purpose, the parties had entered into inter-alia a Wrap Agreement dated 30.07.2016 (hereinafter referred to as the 'Agreement'). In terms of Clause 1.7 of Schedule-III of the Agreement, the petitioner has submitted irrevocable and unconditional bank guarantees for securing performance of the Agreement. It is submitted by the petitioner that subsequent to the execution of the above agreement, the parties agreed to reduce the quantity of WTGs to 33 instead of and in place of 50 as has been mentioned in the agreement. This fact is not disputed by learned senior counsel for the respondent No.1.

4. It is submitted by learned counsel for the petitioner that WTGs have been duly commissioned as would be evident from the Commissioning Letter dated 30.04.2017 and "STPT Certificate-Green Infra Wind Solutions Limited" dated 03.08.2017 which certifies that the 'Average Machine Availability' over the period 18.07.2017 to 23.07.2017 was 99.74%. He further draws my reference to Clause 1.7(b) of Schedule-III to the Agreement to submit that the bank

guarantees can be invoked by the respondent only “to recover undisputed payment due by the supplier to the owner under this agreement”. He submits that as no claim has been made against the petitioner by the respondents, there is no such undisputed payment due from the petitioner as on today. Further, relying upon Clause 11, 12 and 13 of the Schedule-III to the agreement, learned counsel for the petitioner submits that as the WTGs have been commissioned and STPT Certificate issued showing the due performance of the same, these bank guarantees cannot, as on today, be invoked in any case. He further submits that no “Notice of Default” in terms of Clause 17 of the agreement has been issued by the respondent to the petitioner till date. He submits that though, Notice of Default has been issued to the petitioner under the Operation and Management Agreement (O&M Agreement), the same is an independent agreement. He submits that even if a default is presumed under the said agreement, the present bank guarantees cannot be invoked.

5. The present petition has been filed by the petitioner on a mere apprehension as the bank guarantees have not been invoked by the respondent No.1 till date. The apprehension of the petitioner is that the respondent No.1, without issuing notice of default, may proceed to invoke the bank guarantees for its alleged disputes in relations to the O&M Agreement. He further submits that, in similar agreements in relation to other territories, the respondent has invoked the bank guarantees. In some of them, the petitioner could approach the Court in time and ad-interim order of protection was granted in favour of the petitioner, however, in certain other cases, the bank guarantees stood

invoked without the knowledge of the petitioner because of which the petitioner could not approach the Court in time and, therefore, the same were encashed by group companies of Respondent No.1. He submits that such invocation and encashment was contrary to the terms of the agreement. He further submits that thereafter the petitioner had approached this Court for seeking deposit/securing the amount so received by Respondent No.1 and its group companies on such encashment of bank guarantees, however, this Court has rejected such prayer. He submits that the petitioner will be left remediless in case, at least, limited protection is not granted in favour of the petitioner at this stage.

6. On the other hand, learned senior counsel for the respondent No.1 submits that Respondent No.1 is not the respondent in other matters referred by the petitioner and therefore, the encashment of Bank Guarantees in other cases has no relevance. He further submits that certain payments were released in favour of the petitioner only on the security of the bank guarantees in question and therefore, any order of restraint would leave the respondent unsecured. It is submitted that the bank guarantees are unconditional, unequivocal and irrevocable in nature and therefore, no order of restraint can be passed against the respondent from invoking the same. He further submits that the respondent No.1 is within its right to invoke the bank guarantees. He submits that any order of protection that may be granted in favour of the petitioner, in fact, would amount to re-writing the agreement between the parties. He submits that mere apprehension, does not amount to a cause of action and therefore, in

the absence of cause of action, present petition is not maintainable; admittedly, as no invocation has been done till today, there is no cause of action. It is submitted that there can be no remedy without entitlement, therefore, the petitioner is not entitled for any order of protection. Relying upon the judgment of Bombay High Court in ***Mohit Minerals Pvt. Ltd. v. Maharashtra Small Scale Industries Development Corporation Ltd.***, 2012 SCC Online Bom 1054, he submits that the agreement does not envisage any hearing or notice being given to the petitioner before invocation of the bank guarantee and therefore, this Court cannot and ought not to grant any such relief prayed by the petitioner.

7. I have considered the submissions of learned counsels for the parties. It is not disputed before me that as on today there is no notice of default issued by the respondent No.1 to the petitioner. Learned senior counsel for the respondent No.1 is not even in a position to state whether respondent No.1 intends to invoke the bank guarantees in immediate future. In fact, his submission is that such decision has not been taken by respondent No.1, and that is why the petition is premature and is not maintainable. Equally, the Court cannot lose sight of the fact that the group of companies of respondent No.1, under similar situation, had invoked the bank guarantees and encashed the same, even before the petitioner could approach the Court of law for seeking protection. Whether the petitioner at all would have been entitled to seek any order of protection in those cases or in the present case is not the question; the question only is whether the petitioner at this stage has a valid apprehension that respondent No.1 may, only to

defeat any right of legal remedy to the petitioner, invoke the bank guarantees behind its back so as to leave the petitioner remediless. As noted above, it is not disputed before me that till date there is no notice of default under the agreement issued by the respondent No.1 to the petitioner, therefore, the petitioner cannot even be said to be aware of the alleged default, if any, on part of the petitioner which may entitle the respondent No.1 to invoke the bank guarantees.

8. Though, submissions have been made by the learned counsel for the parties submitting that there is or there is not a default of the agreement committed by the petitioner, in my opinion, same is premature in nature in absence of a Notice of Default issued by the respondent No.1 to the petitioner. Taking into the account that encashment of bank guarantees has a civil consequence in the economic scenario today, I am of the opinion that the petitioner, at least, is entitled to a notice of default before the bank guarantee is invoked. In *M/s Gangotri Enterprises Ltd. Union of India*, AIR 2016 SC 2199, Supreme Court had drawn the distinction between the general principles relating to the bank guarantee and the right of a contracting party to invoke such bank guarantee towards the claim of damages against other.

9. In view of the above, I am of the opinion that at the present stage, the equity between the parties can be balanced by directing the respondent No.1 to give a notice of five working days to the petitioner before invoking the bank guarantees. My above order is not to be construed as expression on merits to the claim of either party and would not bind either party in any future litigation that may ensue

upon invocation of the bank guarantee or otherwise by the respondent No.1 or the Petitioner. It is re-emphasised that the present order of grant of limited protection to the petitioner is being passed as the bank guarantees are not yet invoked and even notice of default has not been issued by the respondent No.1.

10. Learned senior counsel for the respondent No.1 submits that grant of such interim protection would in fact leave a door open to similar litigations in other cases by the persons giving such bank guarantee to approach this Court seeking similar relief without any valid apprehension. I am not persuaded by such submissions. The present order is being passed on its peculiar facts and would not be a binding precedent for other cases. Each case has to be considered on its own merits and this order certainly would not mean that in other cases as well, the party to the contract is entitled to an advance notice before invocation of the bank guarantee.

11. The petition is allowed in the above terms.

NAVIN CHAWLA, J

NOVEMBER 29, 2017/vp